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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-539

ZENITH RADIO CORPORATION, *Petitioner*

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Customs and Patent Appeals

MOTION FOR LEAVE TO FILE BRIEF ON BEHALF OF THE UNION DES INDUSTRIES DE LA COMMUNAUTE' EUROPEENNE AS AMICUS CURIAE IN SUPPORT OF AFFIRMANCE

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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Pursuant to Supreme Court Rule 42(3), Union des Industries de la Communaute' Europeenne (hereinafter "UNICE") respectfully moves for leave to file the attached brief as Amicus Curiae in support of affirmance of the judgment below. Counsel for respondent has consented to the filing of this brief; counsel for petitioner has not consented.

The interest of Amicus is as follows:

UNICE represents the interests of the industries of the Member States of the European Economic Community.[1] The industries in the EEC engage in extensive international trade,[2] and the economic interests of these industries thus are influenced to a considerable degree by the international terms of trade. Indeed, a major shift in these terms of trade could produce a threat to the survival of various European companies.

The holding of the Court in this case could result in a basic change in these terms or conditions. The petition seeks a holding that the non-excessive remission of indirect taxes upon the export of a product constitutes a "bounty or grant", within the meaning of Section 303 of the Tariff Act of 1930, as amended. Such a holding would reverse a practice that has governed international trade for more than three quarters of a century, and nullify formal rules that have governed trade in the post-World War II era. The petition thus questions one of the basic principles on which the trade of most countries is based, including the trade of the United States, Japan and the EEC. The interests of the industries in the EEC, consequently, could be affected vitally by the outcome of this case.

Since a Supreme Court decision on the issue in this case has important international ramifications, UNICE

[1] UNICE is the Union of Industries of the European Communities, and includes industries in Belgium, Denmark, France, Germany, Ireland, Italy, Luxembourg, Netherlands, and the United Kingdom.

[2] Exports account for approximately 22 percent of the Gross Domestic Product of the nine Member States of the EEC. Exports from these countries to the United States account for approximately 17 percent of United States imports.

seeks to bring to the Court through an Amicus Curiae brief the benefit of its collective experience with international attempts to avoid distortion in day to day world trade, and the implication of that experience as it bears on the question of the reasonableness of the decision of the Secretary of the Treasury at issue here. Accordingly, Amicus requests that this Court grant leave to file the attached brief.

Respectfully submitted,

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STATUTE INVOLVED

Section 303(a)(1) of the Tariff Act of 1930, 46 Stat. 687, as amended, 19 U.S.C. 1303(a)(1) (Supp. V 1975) provides:

> "Whenever any country, dependency, colony, province, or other political subdivision of government, person, partnership, association, cartel, or corporation, shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export of any article or

merchandise manufactured or produced in such country, dependency, colony, province, or other political subdivision of government, then upon the importation of such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to any duties otherwise imposed, a duty equal to the net amount of such bounty or grant, however the same be paid or bestowed."

QUESTION PRESENTED

Whether the remission of the Japanese Commodity Tax, which is imposed on certain consumer electronic products only if they are sold in Japan, is a bounty or grant within the meaning of Section 303 of the Tariff Act of 1930.

STATEMENT

Amicus agrees with the Statement of the case as set forth in respondent's brief. In brief, the Secretary of the Treasury has concluded that the non-excessive remission of indirect taxes—that is, those taxes imposed on or with respect to a product—does not constitute a "bounty or grant" within the meaning of Section 303 of the Tariff Act of 1930. The question for the Court is whether that interpretation of the statute is reasonable in light of the statutory language and its legislative history. Amicus agrees with respondent that this is a question of law, and that the statutory purpose and legislative history support the

Secretary's determination.[1] In this brief, Amicus contends that Section 303 requires the Secretary to interpret the "bounty or grant" provisions in a reasonable manner, and that the Secretary's determination is reasonable in view of the political and commercial realities of international trade.

SUMMARY OF ARGUMENT

Section 303 is a broadly worded unfair trade practice statute that must be construed reasonably in light of the congressional purpose. The statute necessarily is broad to permit the Secretary to respond flexibly to new and varied "unfair" practices, but this breadth does not require the Secretary to impose countervailing duties in circumstances where the congressional purpose would not be furthered.

The Secretary's interpretation, at issue here, is consistent with the General Agreement on Tariffs and Trade to which the United States is a party and the Treaty of Rome which established the European Economic Community (EEC). These international standards themselves grew out of United States proposals and practices. They were implemented to assure that the treatment of consumption taxes at international borders was trade neutral to the fullest extent possible and to permit fiscal autonomy to the country of consumption.

The EEC itself, in order to avoid trade distortion among its own members in intra-EEC trade, has adopted the practice of border tax remission consistent with the determination of the Secretary of the Treas-

[1] Amicus also agrees with respondent's position that the Secretary's position is not inconsistent with the prior cases of this Court.

ury in this case. For the Secretary of the Treasury likewise to determine that this practice is trade neutral in the context of a broadly worded unfair trade statute is eminently reasonable.

Moreover, the treatment of state and local sales taxes in interstate commerce within the United States parallels the international practice which the Secretary of the Treasury upheld in the determination at issue. This domestic experience underscores the reasonableness of the Secretary's determination in the international context of this case.

This Court should not overrule an 80 year administrative practice of the United States, which has achieved international sanction and approval, and upon which other nations and all international commerce have placed fundamental reliance, absent a compelling showing that continued adherence to the long-standing interpretation is unreasonable. No such showing is possible.

ARGUMENT

I. SECTION 303 REQUIRES THE SECRETARY OF THE TREASURY TO INTERPRET THE "BOUNTY OR GRANT" PROVISIONS OF THE ACT IN A REASONABLE MANNER.

Section 303 of the Act generally mandates that a countervailing duty be imposed whenever any country bestows a "bounty or grant" upon any product subsequently imported into the United States.[2] Although the statute requires the Secretary to impose a countervailing duty if in fact a "bounty or grant" is being paid or bestowed, it leaves to the Secretary the determination as to whether any given practice constitutes a "bounty or grant" within the meaning of the Act.

[2] There are exceptions not relevant here. Section 303(d) of the Act permits the Secretary to waive imposition of countervailing duties during a temporary period if certain findings are made.

Nowhere in the Act are the terms "bounty" or "grant" defined. In a literal sense, virtually any governmental assistance program could be considered a direct or indirect bounty or grant upon the manufacture, production, or export of merchandise. For example, government programs such as free public education can be said to provide an indirect benefit to manufacturing, by providing industry with an educated work force; government sponsored research and development directly benefits the industry manufacturing or producing the goods developed; and government-financed highways, by facilitating transportation, obviously benefit, at least indirectly, industries in the countries concerned. But no one would contend seriously that Congress intended to require the Secretary of the Treasury to levy countervailing duties to offset all programs that benefit industry. The terms "bounty" and "grant" are undoubtedly broad, but they must be construed in light of the congressional purpose to deal with "unfair" trade practices. Title III of the Trade Act of 1974,[3] which amended in part and reenacted the 1930 Act,[4] is entitled "Relief From Unfair Trade Practices". An identical description is given in the House Report,[5] and the Senate Report notes that "Title III deals with 'unfair' and 'illegal' trade practices adversely affecting U.S. commerce".[6]

Congress clearly selected such broad language to enable the Secretary to respond if any nation subse-

[3] 88 Stat. 2041 *et seq.* (1975).

[4] 19 U.S.C. § 1303.

[5] H.R. Rep. No. 93-571, 93d Cong., 1st Sess. 134 (1973).

[6] S. Rep. No. 93-1298, 93d Cong., 2d Sess. 163 (1974).

quently established any one of an unlimited number of programs designed to give its industries an "unfair" competitive edge. But the selection of language designed to give the Secretary the flexibility to respond to new and varied "unfair" trade practices should not be read to *require* the Secretary to impose countervailing duties in circumstances where the congressional purpose is not implicated.[7]

The Congress has charged the Secretary of the Treasury with the administration and enforcement of the provisions directed against unfair trade practices, including the determination as to whether the practices of foreign governments are bounties or grants and therefore are unfair and illegal. Judicial review of that determination should be in accord with the well-settled rule that "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969). The agency's interpretation is entitled to considerable deference where, as here, the agency adopted its interpretation shortly after enactment of the statute and has consistently

[7] An analogous situation obtains with respect to the Sherman Act (15 U.S.C. 1 *et seq.*). In the course of mandating a rule of reason for interpretation of that Act, (Standard Oil Co. v. United States, 221 U.S. 1, 60 (1911)) this Court noted that the Act's language was "broad enough to embrace every conceivable contract or combination which could be made concerning trade or commerce". Similarly, it can be said that Section 303 is "broad enough to embrace every conceivable" governmental practice. Clearly, the interpretation of Section 303's broad provisions—provisions in large measure directed toward the programs of friendly sovereign governments—must be based on a reasonable approach that takes account of the congressional purposes.

adhered to that interpretation for 80 years. Absent a clear showing that the Secretary's interpretation is "unreasonable" in light of the congressional purposes, his interpretation should be affirmed.

II. THE SECRETARY'S INTERPRETATION OF THE STATUTE IS REASONABLE.

A. The Secretary's Determination Is In Accord With Other International Attempts To Achieve Trade Neutrality.

The Secretary's long-standing interpretation of Section 303 is grounded on the view that nonimposition of a countervailing duty in the circumstances at issue here is essential to trade neutrality. The reasonableness of that view is supported by similar provisions in the General Agreement on Tariffs and Trade (GATT)[8] and the Treaty of Rome.[9]

Of particular interest are the international standards governing national treatment of indirect taxes upon exportation of products set forth in Article VI:4 of the GATT:

> "No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to anti-dumping or countervailing duty by reason of the exemption of such product from duties or taxes borne by the like product when destined for consumption in the country of origin or exportation, or by reason of the refund of such duties or taxes."[10]

[8] 61 Stat. pt. 5 at A3.

[9] Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11.

[10] Article III, dealing with national treatment of internal taxes, permits the assessment of such taxes on imported products provided such assessment is not in excess of the taxes applied, directly or indirectly, to like domestic products.

This approach to the problem of the exemption of exported products from domestic consumption taxes, and the rebate to exporters of such taxes that may have been collected on the product prior to export, was originally proposed by the United States in 1946, in its Suggested Charter For An International Trade Organization Of The United Nations.[11] Upon the failure of the formation of an International Trade Organization of the United Nations, the General Agreement on Tariffs and Trade was entered into in 1947 and Article VI was adopted at that time.

Following a major Review Session of the GATT Contracting Parties, the provisions of the Agreement were made even more explicit in 1957 by Ad Article XVI:

> "The exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy."

[11] Executive Branch GATT Studies, Committee on Finance, United States Senate, compilation of 1973 studies prepared by the Executive Branch, 93d Cong., 2d Sess., 19 (1974). The U.S. proposal which led to the provisions of Article VI:4 provided: "Except as provided in paragraph 3 of this Article, no Member shall grant, directly or indirectly, any subsidy on the exportation of any product, or establish or maintain any other system which results in the sale of such product for export at a price lower than the comparable price charged for the like product to buyers in the domestic market, due allowance being made for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability. *The preceding sentence shall not be construed to prevent any Member from exempting exported products from duties or taxes imposed in respect of like products when consumed domestically or from remitting such duties or taxes which have accrued.*" (Emphasis supplied.)

The Contracting Parties to the GATT with considerable justification rely upon the provisions of the GATT for the rules governing their trade with the United States. These GATT provisions governing border adjustments for consumption taxes rest upon the assumption that such taxes are borne by the consumer.[12] The objective is not to tax producers—there are more direct and efficient forms of taxation to achieve that result. And, the intent clearly is not to gain any advantage in international trade.[13]

To the contrary, the GATT provisions were implemented to assure that the treatment of consumption taxes at international borders was trade neutral to the fullest extent possible. The underlying rationale of GATT is that revenue from consumption taxes should inure to the government of the country of consumption; in this case, for example, it is the Government of the United States—or its states and localities—and not the Government of Japan, that is entitled to the pro-

[12] Some commentators point out that factors such as fiscal and monetary policies, the administrative mechanism of the tax, its evolution, and its uniformity can have a bearing on whether such taxes are completely shifted forward to the consumer. Abstract manipulation of these variables makes it possible to postulate a set of economic conditions in which consumption taxes, including U.S. retail sales taxes, are largely if not totally borne by the producer. Such abstractions may be valuable analytical tools but do not exist in the real world.

[13] "No country has imposed a general sales tax simply in order to gain an alleged advantage in international trade". C. S. Shoup, *Indirect and Direct Taxes and Their Influence on International Trade*, in Excise Tax Compendium, Compendium of Papers on Excise Tax Structure, submitted to the Committee on Ways and Means in connection with the panel discussion on the same subject to be conducted by the Committee on Ways and Means on June 15, 1964. (G.P.O. 1964), at 60.

ceeds of taxes levied on consumers in the United States. The result is that all like products in the country of consumption are taxed in a like manner.[14] Any other result would be unworkable. On the one hand, if consumption taxes were levied in the country of production but not the country of consumption, then imports in the consuming country would be either at an advantage or at a disadvantage in competition with domestic goods, depending upon the relative level of consumption taxes in the two countries.[15] On the other hand, if consumption taxes were imposed in both the country of production and the country of consumption, the goods would be subject to double taxation, a result that not only could greatly reduce the volume of international trade, but could itself be contrary to treaty obligations of the countries concerned.

The position taken in the GATT with respect to remission of indirect taxes also is followed in the European Economic Community. Article 96 of the Treaty of Rome provides:

> "Products exported to the territory of any Member State may not benefit from any drawback of internal charges in excess of those charges imposed directly or indirectly on them."

It is useful to note some of the background to this provision. The establishment of the EEC in the mid-

[14] "This concept was carried over into the GATT in 1947, as proposed by the United States and other countries, reflecting the practical view that governments and businessmen would not have accepted procedures which exempted competing imported goods from consumption taxes imposed on similar domestic goods." Executive Branch GATT Studies, *op cit.* 8.

[15] Trade neutrality would obtain only in the unlikely event that the taxes in each country were set at the same rate.

twentieth century posed more difficult problems for the Member States than did the establishment of the United States as a federal republic nearly 200 years earlier. The economies of the several states that formed the American federal union largely were agricultural, and their fiscal systems were not as complicated as those of present day Europe. The attempt to avoid trade distortion among EEC Member States thus presented obvious difficulties. Nonetheless, drawing upon the experience of the United States in solving similar problems relating to the tax systems of the several states as those systems applied to goods moving in interstate commerce, the experience gained through international trade,[16] and the international standards proposed by United States and accepted by its trading partners, and the EEC's own extraordinarily detailed analyses,[17] the EEC adopted Article 96 of the Treaty of Rome.

The goal of Article 96, like that of the GATT provisions, is trade neutrality in the treatment of indirect taxes at the borders of the Member States of the EEC. The EEC, because of political sensitivity, established administrative provisions to guarantee that even highly theoretical trade distorting aberrations among its Members could not occur. Had trade neutrality not been achievable, establishment of the EEC in all

[16] "Provisions similar to those in the GATT have been used in commercial treaties and agreements for over 100 years and were contained in bilateral trade agreements between the United States and other countries from almost the beginning of the reciprocal trade agrements program in 1934". Executive Branch GATT Studies, *op cit.* 8.

[17] The EEC Reports on Tax Harmonization, Int. Bur. of Fiscal Documentation, Amsterdam, 1963.

likelihood would have been impossible. The goal of trade neutrality among the Member States has been achieved through Article 96, just as the goal of trade neutrality internationally has been achieved through Article VI:4 of the GATT.

The GATT and the Treaty of Rome are founded upon principles derived from United States proposals and practice. Their intent and effect is to achieve trade neutrality and to avoid trade distortion in the treatment of indirect taxes at national borders. Virtually every affected government has determined that implementation of these provisions in the real commercial world has achieved the desired trade neutrality and avoided trade distortion. For the Secretary of the Treasury to determine likewise in the context of a broadly worded unfair trade practice statute is eminently reasonable.[18]

B. The Secretary's Determination Is In Accord With Internal United States Treatment Of Consumption Taxes.

Indirect taxes in the United States largely take the form of state and local sales taxes. States and localities impose these taxes upon consumers in their jurisdictions to raise revenue, not to gain trade advantages *vis-a-vis* other states and localities. In the course of

[18] Petitioners appear to contend that double taxation is the result intended by the Congress in enacting Section 303. Petitioners argue that consumer electronic products from Japan should be subject to consumption taxes in that country, as well as whatever consumption taxes may apply in the United States. Not only is such a result not mandated by Section 303, we submit, but further, such a result would produce the very trade distortion Section 303 was designed to eliminate.

holding that it is constitutionally permissible for the state in which final consumption occurs to impose consumption taxes on the products of interstate commerce, this Court observed:

> "Despite mechanical or artificial distinctions sometimes taken between the taxes deemed permissible and those condemned, the decisions appear to be predicated on a practical judgment as to the likelihood of the tax being used to place interstate commerce at a competitive disadvantage."[19]

The Court proceeded to note with respect to the consumption tax before it that:

> "Equality is its theme. It does not aim at or discriminate against interstate commerce. It is laid upon every purchaser, within the state, of goods for consumption, regardless of whether they have been transported in interstate commerce."[20]

The United States' experience with interstate commerce—which is analogous to the issue presented with respect to international trade—indicates that trade is

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[19] *McGoldrick* v. *Berwind-White Co.*, 309 U.S. 33, 45 (1940).

[20] Ibid, 48-49 (Citation omitted). Possible duplication of tax burden could occur within the United States through the application of both sales and use taxes on interstate transactions. This Court never has specifically considered the problem, perhaps because most states have exempted from sales tax a sale pursuant to a contract requiring shipment outside the state. This practice constitutes the remission upon export from the state of an indirect tax. See, generally, Kust & Sale, *State Taxation of Interstate Sales*, XLVI Va. L.R. 1290, 1300-1301. See, also, *Southern Pac. Co.* v. *Gallagher*, 306 U.S. 167, 172 (1939) ("discrimination against interstate commerce, arising from a second exaction for use after a foreign tax on sale, could not exist as provision was made for a credit against a local tax of any such foreign levy.").

free and nondistorted when the jurisdiction of consumption rather than the jurisdiction of production collects the indirect tax. It was this experience with interstate commerce that prompted the United States to propose similar principles for the handling of indirect taxes in international trade. And it is this domestic experience that underscores the reasonableness of the Secretary's determination that the remission of indirect taxes is not a trade distorting "bounty" within the meaning of Section 303.

C. The Secretary's Determination To Adhere To The Long-Standing Interpretation Is In Accord With International Trading Relationships.

In the two previous subdivisions of this argument, Amicus has attempted to underscore the reasonableness of the Secretary's interpretation of the statute by pointing to the use of the same approach in similar contexts requiring trade neutrality. And it is the view of this Amicus that the widespread use of this approach in "trade neutrality" contexts would support the Secretary's determination even if that interpretation were of only recent origin.

But the Court does not have before it today a recent development in the establishment of international terms of trade. The interpretation at issue here has been the official position of the Secretary for 80 years, and the international trading partners of the United States clearly have taken action in reliance upon that construction. Industry also has constructed a network of world trade in which this practice constitutes the most fundamental fiscal principle. As noted earlier, the position of the United States was adopted in the GATT; indeed, the GATT provision exists largely due to the efforts of the United States.

Amicus respectfully suggests that this significant international reliance upon and adoption of a consistent United States policy is entitled to serious consideration in determining whether the Secretary's *continued adherence* to that long-standing interpretation is reasonable. Since the inception of GATT, numerous nations have established fiscal systems based in large measure upon indirect taxes in reliance upon GATT rules.[21] A holding that such tax systems violate a United States *unfair* trade practice statute not only would cause serious consequences in trade itself, but would have equally serious implications for the international relations of the United States.

It cannot be presumed that the other GATT Contracting Parties would be prepared to renounce their rights under the Agreement. The Contracting Parties would be forced, by the serious economic consequences that would follow such a decision, to take internationally-permitted counter measures. Moreover, the Contracting Parties to GATT presently are engaged in multilateral negotiations aimed in part at dealing with the entire question of countervailing duties and subsidies. A sudden change in the United States' 80 year practice, as sought by petitioners in this case, would destroy the good-faith basis for these negotiations.

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[21] Among the GATT Contracting Parties employing indirect taxes are Argentina, Australia, Austria, Brazil, Burundi, Canada, Central African Republic, Chad, Chile, EEC Member States, Gabon, Ghana, India, Indonesia, Ivory Coast, Jamaica, Japan, Kenya, Korea, Madagascar, Malaysia, Mauritania, New Zealand, Nicaragua, Niger, Nigeria, Pakistan, Peru, Portugal, Senegal, Spain, Sweden, Switzerland, Tanaznia, Togo, Uganda, United Republic of Cameroon, United States of America, Upper Volta, Uruguay. U.N. Doc. ST/ESA/SER. E/6 (1976).

This Court should not render a decision that undoubtedly would introduce new uncertainty and instability into international trade absent compelling evidence that the Secretary has pursued an unreasonable approach in light of the congressional purposes.

CONCLUSION

The broad language of Section 303, its legislative history and stated purpose, and the non-trade-distorting effect of the practice in question compel the conclusion that the non-excessive rebate or remission of indirect taxes upon exportation of a product does not constitute a "bounty or grant" as a matter of law within the meaning of Section 303 of the Trade Act. Consequently, the judgment of the Court of Customs and Patent Appeals should be affirmed.

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